

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

## OBESITY RESEARCH INSTITUTE, LLC,

Case No. 15-cv-595-BAS(MDD)

**ORDER RE: OBESITY  
RESEARCH INSTITUTE, LLC'S  
MOTION TO FILE  
DOCUMENTS UNDER SEAL**

[ECF No. 330]

## FIBER RESEARCH INTERNATIONAL, LLC, *et al.*,

## Defendants.

## AND RELATED COUNTERCLAIM

Presently before the Court is Plaintiff Obesity Research Institute, LLC’s (“ORI”) renewed motion to file certain documents under seal. ORI indicates that its counsel met and conferred with Defendant Fiber Research International, LLC’s (“FRI”) counsel, and agreed that “each would be responsible for re-filing motions to seal documents or materials that such party desires redacted or filed under seal, **regardless of which party originally filed the documents as redacted or under seal[.]**” (ORI’s Mot. 1:10-20.)

The Court will refer to each motion by its Electronic Case Filing number (“ECF No.”) on the docket for the purposes of this order as it previously did in the

1 March 17, 2017 Order, a format which ORI has also adopted in their renewed motion.  
2 Both parties also did not re-submit the documents they seek to file under seal in both  
3 redacted and unredacted form, a requirement for this district's sealing procedure in  
4 civil cases. This failure frequently made it difficult for the Court to determine  
5 precisely what the parties sought to be sealed, particularly when the parties sought to  
6 adjust redactions to existing documents.

7

8 **I. LEGAL STANDARD**

9 “[T]he courts of this country recognize a general right to inspect and copy  
10 public records and documents, including judicial records and documents.” *Nixon v.*  
11 *Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978). “Unless a particular court record  
12 is one ‘traditionally kept secret,’ a ‘strong presumption in favor of access’ is the  
13 starting point.” *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir.  
14 2006) (citing *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir.  
15 2003)). “The presumption of access is ‘based on the need for federal courts, although  
16 independent—indeed, particularly because they are independent—to have a measure  
17 of accountability and for the public to have confidence in the administration of  
18 justice.’” *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096 (9th Cir.  
19 2016) (quoting *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995)).

20 A party seeking to seal a judicial record bears the burden of overcoming the  
21 strong presumption of access. *Foltz*, 331 F.3d at 1135. The showing required to meet  
22 this burden depends upon whether the documents to be sealed relate to a motion that  
23 is “more than tangentially related to the merits of the case.” *Ctr. for Auto Safety*, 809  
24 F.3d at 1102. When the underlying motion is more than tangentially related to the  
25 merits, the “compelling reasons” standard applies. *Id.* at 1096–98. When the  
26 underlying motion does not surpass the tangential relevance threshold, the “good  
27 cause” standard applies. *Id.*

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1        “In general, ‘compelling reasons’ sufficient to outweigh the public’s interest  
2 in disclosure and justify sealing court records exists when such ‘court files might  
3 have become a vehicle for improper purposes,’ such as the use of records to gratify  
4 private spite, promote public scandal, circulate libelous statements, or release trade  
5 secrets.” *Kamakana*, 447 F.3d at 1179 (quoting *Nixon*, 435 U.S. at 598). However,  
6 “[t]he mere fact that the production of records may lead to a litigant’s embarrassment,  
7 incrimination, or exposure to further litigation will not, without more, compel the  
8 court to seal its records.” *Id.* (citing *Foltz*, 331 F.3d at 1136). The decision to seal  
9 documents is “one best left to the sound discretion of the trial court” upon  
10 consideration of “the relevant facts and circumstances of the particular case.” *Nixon*,  
11 435 U.S. at 599.

12        Federal Rule of Civil Procedure 26(c), generally, provides the “good cause”  
13 standard for the purposes of sealing documents. *See Kamakana*, 447 F.3d at 1179.  
14 The test applied is whether “‘good cause’ exists to protect th[e] information from  
15 being disclosed to the public by balancing the needs for discovery against the need  
16 for confidentiality.” *Pintos v. Pac. Creditors Ass’n*, 605 F.3d 665, 678 (9th Cir. 2010)  
17 (quoting *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213  
18 (9th Cir. 2002)). Under Rule 26(c), only “a *particularized showing* of ‘good cause’ .  
19 . . is sufficient to preserve the secrecy of sealed discovery documents[.]” *In re*  
20 *Midland Nat. Life Ins. Co. Annuity Sales Practices Litig.*, 686 F.3d 1115, 1119 (9th  
21 Cir. 2012) (emphasis added); *see also Kamakana*, 447 F.3d at 1180 (requiring a  
22 “particularized showing” of good cause). “Broad allegations of harm, unsubstantiated  
23 by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.”  
24 *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992). Moreover,  
25 a blanket protective order is not itself sufficient to show “good cause” for sealing  
26 particular documents. *See Foltz*, 331 F.3d at 1133; *Beckman Indus.*, 966 F.2d at 476;  
27 *San Jose Mercury News, Inc. v. U.S. District Court, N. Dist.*, 187 F.3d 1096, 1103  
28 (9th Cir. 1999).

1       **II. ANALYSIS**

2       **A. ECF No. 190**

3       In its renewed motion with respect to ECF No. 190, ORI requests leave to file  
4       under seal portions of FRI's motion to exclude Dr. Laura Lerner's Report and  
5       Testimony in addition to Exhibit 3 to the Flynn Declaration, which includes the Dr.  
6       Lerner's Expert Report and numerous supporting exhibits. As ORI describes, the  
7       portions targeted for redaction and sealing generally appear to present or discuss  
8       proprietary testing methods or other proprietary information warranting sealing.

9       Because ORI provides compelling reasons to seal portions of FRI's motion in  
10      addition to portions of Dr. Lerner's Expert Report and certain supporting exhibits,  
11      the Court **GRANTS** ORI's motion for leave to file these documents under seal. (ECF  
12      No. 190.) If it is not already available on the public docket, ORI must also file the  
13      motion and/or expert report with the appropriate redactions on the public docket.

15       **B. ECF No. 216**

16       In its renewed motion with respect to ECF No. 216, ORI narrows its request  
17      to file portions of its memorandum in support of its motion to exclude Dr. Fahey and  
18      Exhibit 5 to the Flaherty Declaration. ORI appears to properly target portions of the  
19      memorandum that discusses proprietary information or material appropriate for  
20      sealing, but fails to apply the same level of precision with respect to Exhibit 5, which  
21      is a deposition transcript of James R. Ayres. For example, it is unclear how questions  
22      about the witness' education is appropriate for sealing. Sealing the entire deposition  
23      transcript is too broad based on the explanation ORI provides.

24       Accordingly, the Court **GRANTS IN PART** and **DENIES IN PART** ORI's  
25      motion for leave to file these documents under seal. (ECF No. 216.) Specifically, the  
26      Court **GRANTS** the request as to ORI's memorandum and **DENIES** as to Exhibit 5.  
27      Furthermore, the Court notes that ORI originally sought to also seal Exhibits 3, 4, 6,  
28      9, 10, and 11 to the Flaherty Declaration. ORI appears to no longer seek to seal these

1 exhibits. Thus, ORI must file these exhibits on the public docket.  
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3 **C. ECF No. 221**

4 For the same reasons the Court granted ORI leave to file under seal portions  
5 of the brief related to ECF No. 216, the Court also **GRANTS** ORI leave to file  
6 portions of its opposition to FRI's motion to exclude the report and testimony of Dr.  
7 Laura Lerner. (ECF No. 221.) If it is not already available on the public docket, ORI  
8 must also file its opposition brief with the appropriate redactions on the public docket.  
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10 **D. ECF No. 223**

11 In its renewed motion with respect to ECF No. 223, ORI seeks leave to file  
12 under seal portions of its opposition to FRI's motion to exclude non-retained experts  
13 in addition to Exhibits 6 and 7, which are both deposition transcripts. ORI also  
14 concedes that Exhibit 4, which it previously sought to file under seal, would not  
15 satisfy the compelling-reasons standard.

16 For the same reasons the Court granted ORI leave to file under seal portions  
17 of the brief related to ECF No. 216, the Court also **GRANTS** ORI leave to file under  
18 seal portions of its opposition to FRI's motion to exclude non-retained experts. (ECF  
19 No. 221.) The Court is giving ORI some latitude regarding the memorandum as all  
20 of the content identified for sealing may not meet the compelling-reasons standard.  
21 For example, general statements regarding Mr. Ayers' knowledge of the "specific  
22 formulation" and communications with manufacturers about "current specifications"  
23 lack the specificity warranting sealing. (ORI's Mot. 13:3-7, ECF No. 224.)

24 Similarly, most of the content targeted for sealing in Exhibits 6 and 7 satisfies  
25 the compelling-reasons standard, though at certain points the redactions were over-  
26 inclusive. Taking an example from the Ayres Deposition, redacting the attorney's  
27 statement that an individual has "left the room" and the request for the reporter to  
28 "read the question back" does not meet the compelling-reasons standard warranting

1 sealing. (Ayres Dep. 47:3-5.) The Court will nonetheless give ORI some latitude here  
2 and **GRANT** its request to seal portions of Exhibits 6 and 7.

3 ORI is reminded that because Exhibit 4 is not subject to a sealing order, it must  
4 file the entire exhibit on the public docket. It must also file the exhibits with revised  
5 redactions on the public docket.

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7 **E. ECF No. 231**

8 ORI appears to properly target portions of the FRI's reply in support of its  
9 motion to exclude Dr. Lerner's report and testimony that discusses material  
10 appropriate for sealing. Furthermore, Exhibits 2 and 3 appear to contain information  
11 about proprietary testing methods. Therefore, the Court **GRANTS** ORI's request for  
12 leave to file under seal portions of FRI's reply and Exhibits 2 and 3. (ECF No. 231.)

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14 **F. ECF No. 234**

15 For the same reasons the Court granted ORI leave to file under Exhibits 2 and  
16 3 related to ECF No. 231, the Court also **GRANTS** ORI leave to file under seal  
17 Exhibits 1 and 2 to the Persinger Declaration. (ECF No. 233.)

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19 **G. ECF No. 247**

20 ORI only renews its request for leave to file portions of Exhibit 5 under seal.  
21 It concedes Exhibit 8 "likely would not satisfy the compelling reasons standard[.]"  
22 For the same reasons the Court granted ORI leave to file exhibits under seal related  
23 to ECF No. 234, the Court also **GRANTS** ORI leave to file portions of Exhibit 5  
24 under seal. (ECF No. 247.) ORI is reminded that because Exhibit 8 is not subject to  
25 a sealing order, it must file the entire exhibit on the public docket. Furthermore, if it  
26 is not already available on the public docket, ORI must also file Exhibit 5 with the  
27 appropriate redactions on the public docket.

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H. ECF No. 250

In its renewed motion, ORI narrows its request to file portions of its reply in support of its motion to exclude Dr. Fahey. With its revisions, ORI appears to properly target portions of its reply that discusses material appropriate for sealing. Therefore, the Court **GRANTS** ORI leave to file portions of its reply under seal. (ECF No. 250.) ORI is reminded that it must file its reply with the revised redactions on the public docket.

I. ECF No. 276

In its renewed motion to file portions of its pretrial disclosures under seal, ORI contends that the good-cause standard applies. Even if the lower good-cause standard is the one properly applied, it is unclear how general descriptions of particular documents or exhibits contained in an index satisfies that standard. The first entry in that index ORI seeks leave to file under seal describes a graph regarding viscosity. Not the graph itself or any specific information in the graph, but merely that a graph exists. In another example, a reference is made to a distribution and claim-assignment agreement. Again, there are no specifics regarding the contents of that agreement, but merely that one exists. This is a common occurrence in the portions of the index in the pretrial disclosures that ORI seeks to file under seal. Such general descriptions fail to even meet the good-cause standard.

Accordingly, the Court **DENIES** ORI's request for leave to file portions of its pretrial disclosures under seal. (ECF No. 276.)

**J. ECF Nos. 236, 303, 312, & 318**

ORI states that it “does not contend that the material filed under seal previously brought” in ECF Nos. 236, 303, 312, and 318 “merit sealing.” If the documents identified in these requests are not subject to a sealing order, the appropriate party must file the documents at issue in ECF Nos. 236, 303, 312, and 318 on the public

1 docket.

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3 **III. CONCLUSION & ORDER**

4 In light of the foregoing, the Court **GRANTS IN PART** and **DENIES IN**  
5 **PART** ORI's motion for leave to file documents under seal in ECF No. 216, and  
6 **GRANTS** the motion in its entirety for ECF Nos. 190, 221, 223, 231, 234, 247, and  
7 250. The Court also **DENIES** the motion in its entirety for ECF No. 276.

8 Where portions of briefs, exhibits, or other documents have been sealed, and  
9 if not already available on the public docket, ORI must also file these documents with  
10 the appropriate redactions on the public docket. More broadly, any documents where  
11 leave has not been granted to file under seal, such as documents where ORI has  
12 conceded sealing is not warranted, must also be filed on the public docket.

13 For the purposes of this order, the Court acknowledges that ORI does not seek  
14 leave to file certain documents under seal insofar as ECF Nos. 236, 303, 312, and  
15 318. As previously stated, if the documents at issue in ECF Nos. 236, 303, 312, and  
16 318 are not subject to a sealing order, the appropriate party must file the documents  
17 at issue on the public docket.

18 **IT IS SO ORDERED.**

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20 **DATED: July 25, 2017**

  
21 **Hon. Cynthia Bashant**  
22 **United States District Judge**

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